1943

File No. C Prisoners/43

Legal Department

A **BRANCH**

Subject:—

Opinion Under the Prisoners Act 1900

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SRD.
10.7.56. 6c.

L.R.D.I. 1861/5-3-43.

Submitted.

2. Please see R.L.A.'s opinion No. 6018, dated 11th July 1941 and the office notes underlying. It was held therein that there is no legal objection to repealing section 38 of the Prisoners Act, 1900. On the recommendation of the Inspector General of Prisons, H.D. has decided to repeal section 39 which provides for the procedure where removal is desired of a person confined in a prison within a Presidency Town or in a prison more than one hundred miles distant from the place where his evidence is required. H.D. considers that if these sections are amended it will not be necessary to make any consequential changes in section 73 of the Procedure Code, 1894. The R.L.A. is requested to advise whether this view is correct.

3. Section 38 of the Prisoners Act, 1900, provides for transmission of an order of attendence of a prisoner through the Magistrate of the district or sub-division in which the prisoner is confined. Section 39 provides for transmission of an order of attendance of a person confined in a prison within a Presidency town or in a prison more than one hundred miles distant from the place where his evidence is required through the Commissioner of Police or the District Magistrate as the case may be. Section 73 of the Code of Criminal Procedure provides that when a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is to be there served. The sec. Provides for the service of a summons on a person outside the local limits of the jurisdiction of the Court. It does not provide for serving summons on a person confined in a prison. Amendment in sections 38 and 39 of the Prisons Act will not therefore require any consequential amendments in section 73 of the Code. The view taken by H.D. in its o.n. dated 17-2-43 appears to be correct.

Sd/- P.S. Nadkarni
27/3

The view taken by H.D. that section 73 Cr. P.C. requres no amendment is correct. In para 4 of its office note H.D. has stated that section 35 of the Prisoners Act 1900 requires to be amended; it appears that section 37 of that Act also requires to be similarly amended.

Id/- R.T.K.
29/3

A.L.R.

I agree. Reply may be S.A.S's note.

Id/- R.S.H.
30/3

Id/-P.N.M.
3/4

SSD.
10.7.56. 4c.

Office of the R.L.A.

The view taken by H.D. that section 73 Criminal Procedure Code requires no amendment is correct. In paragraph 4 of its offic note, H.D. has stated that section 35 of the Prisoners Act 1900 - requires to be amended; it appears that section 37 of that Act also requires to be similarly amended.

Id/- P.N.M.
6/4

Remembrancer of Legal Affairs.

U.R. to H.D. No. 2519, dated the 7th April 1943.

SSD.

10.7.56. 4c.

R.I. No. 5700
10/5/43.

Submitted.

2. Please see R.A's opinion No. 9866, dated 19-12-42. In accordance with this opinion, the Provl. Govt. authorised under section 40 of the Prisoners Act, 1900, the removal of the prisoner George Martis to the Mhow Cantonment. The I.G.P., Province of Bombay in para.2 of this letter at P. 37 ante states that the prisoner is still confined in Central India Agency Jail at Indore and is being tried by the D.M.Mhow He also further states that if the sentence is not suspended under sec 401 of the Crim. Proc. Code it will be presumed that he was undergoing the sentence imposed on him whilst in Indore Jail, H.D. has expressed its view that since the Prisoner's sentence was not suspended it must be considered that he was undergoing the sentence passed on him by a Court in this Province even though he was confined in a jail in the Mhow Contonment. The R.L.A. is requested to state whether this view is correct.

3. It is only when the sentence on a Prisoner is suspended under sec. 401 of the Criminal Procedure Code, 1998 that the prisoner will have to be brought back to undergo the remaining period of his sentence in this Province. Since the sentence on the prisoner George Martis was not suspended before his removal to Mhow to answer a charge pending against him there it must be considered that he was undergoing the sentence passed on him in this Province even though he was confined in a jail in Mhow Cantonment. Attention of the H.D. may invited to R.L.A.'s opinion 1382, dated 19-4-1927 where it has been held that a convict removed from a prison in one Province to a prison in another Province whether under section 29 or under section 40 continues to x undergo his sentence during his absence from his original prison. The view taken by H.D. in para.2 of its office note, at pp. 39-40, is correct.

Sd/- P.S. Nadkarni.

19/5

P.T.O.

A very urgent reminder received from H.D. is put up below P. 45 post for information

The view at A in Para 2 of H.D. Office note dated 7-5-43 is correct.(vide R.L.A's opinion No. 1382 dated 19-4-1927).

(The prisoner was due to be released on 4-5-43. see P.45 post

Id/- L.E.B.
19/5

A.L.R. I agree. Reply may Be 'B'
Id/- R.S.H.
20/5

R.L.A. Id/- PNM.M.
20/5

SSD.
10.7.56. 4c.

Office of the R.L.A.

The view at A in para 2 of H.D. office note dated 7-5-43 is correct (vide R.L.A's opinion No. 1382 dated 19-4-1927).

Id/- P.N.M.
20-5-43.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 3731, dated the 22nd May 1943.

SSD.
10.7.56. 4c.

Office of the R.L.A.

The Superintendent, Yeravda Central Prison is of opinion that in view of the recent dicision of the Federal Court of India, Government orders that certain prisoners detained under rule 26 of the Defence of India Rules should be treated as 'C' class prisoners under rigorous imprisonment are ultra vires. He therefore suggests that before the security prisoners are prosecuted for hunger strike Government should reconsider the matter. The Inspector General of Prisons states that in the absence of the Federal Court judgment he is unable to express an opinion whether the contention of the Superintendent is correct or not, but considers that in pursuance of the provisions of the Security Prisoners Detention Conditions Order, 1942, there appears to be no objection to prosecuting the security prisoners for going on hunger strike. The papers are referred to the R.L.A. for advice.

2. The first question which arises is whether the detention of security prisoners under rule 26 of the Defence of India Rules is valid in view of the recent decision of the Federal Court. It is no doubt true that the Federal Court has held that rule 26 of the Defence of India Rules was beyond the rule-making powers conferred by clause (x) of section 2(2) of the Defence of India Act, 1939 and was therefore invalid. The effect of this decision is however neutralised by the subsequent promulgation of the Defence of India (Amendment) Ordinance No.XIV of 1943. Section 3 of this Ordinance provides that "for the removal of doubts it is hereby enacted that no Order herebefore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invlaid and shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lowfully conferred by a rule made or deemed to have been made under section 2 of the Defence of India Act, 1939". Moreover, section 2 of the Ordinance substitutes a new clause (x) to section 2(2) of the Defence of India Act and provides that it "shall be deemed always to have been substituted". The effect of this Ordinance is to validate rule 26 with retrospective effect. Unless the Federal Court holds to the contrary the detention of security prisoners

Under rule 26 cannot be deemed to be ultra vires in the light of the Amending Ordinance.

3. The next question that arises is whether the Government orders treating certain security prisoners as "'C' class prisoners under rigorous imprisonment" are ultra vires. Rule 27 of the Security Prisoners Detention Conditions Order empowers Government to relax any of the conditions mentioned in the Order or to issue special orders in case of any particular security prisoner or place of detention. It is true that under rule 3(1) of the said Order security prisoners are divided into two classes - I and II, and that the classification of each security prisoner has to be made by the Government. But while making such classification in respect of any security prisoner Government would it seems be competent to issue a special ~~ex~~ order under ruel 27 that such security prisoner though classified as class II shall be treated in jail as a 'C' class prisoner. Such an order would in my opinion be covered by rule 27 of the Order.

4. The last question for consideration is whether security prisoners can be prosecuted under section 52 of the Prisons Act, 1894 for going on hunger strike in jail. It is no doubt true that clause 16 of the Security Prisoners Detention Conditions order, 1942 provides that security prisoners shall for the purposes of discipline and punishment of offences be subject to such of the rules in the Bombay Jail Manual applicable to convicts as are not inconsistent with the conditions of the Order or with any special orders passed by Government in this behalf. Refusing to eat food or the food prescribed by the Prison Diet Scale is a prison offence under rule 702 of the Bombay Jail Manual and punishable under section 52 of the Prisons Act. Consequently, it is possible to argue that a security prisoner can be prosecuted under section 52 for going on hunger strike. But though the point is not free from doubt, the sounder view appears to be that a person detained under rule 26 of the Defence of India Rules is not a prisnor either civil or criminal within the meaning of the Prisons Act and therefore not subject to any of the provisions of that Act. To sustain a prosecution under section 52 of the Act, it must first be established that the offence was committed by a prisoner coming within the purview of the Act; and it is very doubtful if clause 16 of the Security Prisoners Detention Conditions Order, 1942 can indirectly or by implication enlarge the scope of that section.

Sd/- P.N.M.
24/6
Remembrancer of Legal Affairs

U.R. to H.D. (Spl.)(1), No.56-L, dated the 24th June 1943.

SSD
10.7.56.

Office of the R.L.A.

There is no legal objection to authorising the Inspector General of Prisons by general order under section 29 of the Prisoners Act,1900, to arrange for the transfer of such prisoners to prisons in other Provinces.

Id/- P.N.M.
22/9

Remembrancer of Legal Affairs.

U.R. to H.D., No. 6436, dated the 24th September 1943.

SSD.
10.7.56. 4c.